INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 1054 and 1070

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, *Appellants*

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,
Intervenor-Appellants

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY.
Appellees

On Appeal from the United States District Court for the Western District of Arkansas

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on

the ground that the question is so insubstantial as not to warrant further argument.

QUESTIONS PRESENTED

The question presented by this Motion to Affirm appears to us to be:

1. Does Congress' mandate of compulsory arbitration of train crew manning level disputes, set forth in Public Law 88-108, and the Award entered in that arbitration, preclude the operation of the Arkansas laws prescribing minimum railroad crew consists?

If the judgment is not summarily affirmed the following further questions are presented:

2. Does the Congressional scheme for regulation of controversies between labor and management in the railroad industry, embodied in the Railway Labor Act, and for the regulation of interstate commerce expressed in the National Transportation policy, preclude the operation of the Arkansas laws prescribing minimum railroad crew consists?

3. Do the Arkansas laws in question constitute discriminatory legislation against interstate commerce, in violation of the Commerce Clause?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Public Law 88-108, 77 Stat. 132, 45 U.S.C. following § 157, Arkansas Act 116 of 1907 (Ark. Stat. Ann. §§ 73-720 through 722 (1947)), and Arkansas Act 67 of 1913 (Ark. Stat. Ann. §§ 73-726 through 729 (1947)) are set forth in Appendix B, pp. 68-73, to the Jurisdictional Statement in No. 1054. In addition, there are also involved the Commerce Clause of the United States Constitution, which is set forth in Appendix I hereto (p. 1a), the National Transportation Policy, 54

Stat. 899 (1940), 49 U.S.C. preceding § 1, which is set forth in Appendix II hereto (p. 1a), and the Railway Labor Act, 48 Stat. 1185, as amended, 45 U.S.C. §§ 151 *et seq.*, particularly §§ 2 and 5 through 10 thereof, which sections are set forth in Appendix III hereto (pp. 2a-23a).

In addition, certain provisions of the Award of the National Arbitration Board No. 282—*Eastern, Western, and Southeastern Carriers' Conf. Comm. and Brotherhood of Locomotive Engineers,* 41 Lab. Arb. 673 (1963)—and of the Awards of the local boards with respect to Missouri Pacific Railroad Company, 42 Lab. Arb. 917 (1964), and The Texas & Pacific Railroad Company, are set forth in Appendices IV and V hereto (pp. 24a-39a). The full texts of the National Arbitration Award and of these local awards are set forth in Plaintiffs' Exhibits 4 and 5 in support of Plaintiffs' Motion for Summary Judgment.

STATEMENT

This is a direct appeal from the final judgment entered on March 8, 1965, by a district court of three judges convened pursuant to 28 U.S.C. §§ 2281 and 2284, declaring two Arkansas railroad "crew consist" laws to be in substantial conflict with Public Law 88-108, 77 Stat. 132 (1963), and therefore unenforceable against appellees, and granting an injunction against the enforcement of the Arkansas laws. (Tr. 118)

The circumstances giving rise to the enactment of Public Law 88-108 are thoroughly reviewed in the opinion of the district court. (*Chicago, Rock Island & Pac. R. Co.* v. *Hardin,* 239 F. Supp. 1, 9-11; Juris. St. No. 1054, at 24-28)

Briefly stated, in 1959 and 1960 the railroads on the one hand, and the five railroad operating brotherhoods

on the other, served notices pursuant to Section 6 of the Railway Labor Act as to the subject of the minimum consist of engine and train crews. The railroads proposed to eliminate prior agreements requiring the use of firemen on diesel engines and requiring stipulated numbers of other crew members, and to restore these matters to management discretion. The brotherhoods' proposals were to establish new national rules fixing the minimum crew consist as an engineer, a fireman, and a conductor and two trainmen. In 1960, a Presidential Railroad Commission was established to investigate the facts and make recommendations for the resolution of the dispute arising out of the notices. In 1962 the Commission issued a report which recommended the elimination of firemen in freight service, and recommended procedures whereby the number of brakemen and switchmen would be reduced.

The recommendations of the Presidential Railroad Commission were accepted by the railroads but rejected by the brotherhoods. An effort at mediation through the National Mediation Board was attempted but the National Mediation Board terminated its services when the brotherhoods rejected a proffer of arbitration. See *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963) (holding that the parties were then left to self-help).

Under Section 10 of the Railway Labor Act, the President then created an Emergency Board to investigate and make recommendations respecting the dispute. The Emergency Board's recommendations, submitted on May 13, 1963, were accepted by the railroads but rejected by the brotherhoods. In the face of a clear threat of a nationwide rail strike, the President then requested passage of legislation to deal with the

train manning controversy. Congress' response to this request was Public Law 88-108, imposing compulsory arbitration upon the parties.

The purpose and effect of the Act were well characterized by the court which enforced the Award of the Arbitration Board entered under the Act:

> "Just as it [the Congress] has assumed power to regulate rates, through regulatory commissions, so it is now assuming power in this case to regulate working conditions, wages and similar matters through an Arbitration Board."

Division 700, Brotherhood of Locomotive Engineers v. *National Railway Labor Arb. Bd. No. 282,* 223 F. Supp. 377, 378 (1963). The Act represents the first occasion that Congress has exercised its unquestionable power to provide for the regulation of train crew manning levels and other "crew consist" matters.

The Arkansas laws in question were enacted in 1907 and 1913 and require crews of six men (including three trainmen) on all trains, with certain exceptions, and on switching movements under certain specified circumstances.[1] Moreover, they require, as one of the

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[1] The 1907 legislation relates to freight trains and provides that each such train must have a crew "consisting of not less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided." The exceptions provided in this Act exempt railroad companies whose lines are less than 50 miles in length, and trains of fewer than 25 cars.

The 1913 legislation relates to switch crews operating in cities of the first and second class where switchings are being made "across public crossings within the city limits of the cities." (Cf. Item C(2)(h) of the Award, note 3, *infra.*) The minimum crew provided for in this act is a crew of "one (1) engineer, a fireman, a foreman, and three (3) helpers." However, there is an exception provided for companies operating railroads less than 100 miles in length.

six, a fireman on every such train or switching movement.

The Award of the Arbitration Board, made pursuant to the mandate of Public Law 88-108, in general permitted the abolition of 90% of the firemen's positions in freight service on the railroads. The Award accorded generous protection to the displaced employees. Thus, in substance the Award provided that any fireman with at least ten years' seniority must be retained in engine service, that is, as a fireman or engineer. Moreover, any fireman with between two and ten years' seniority must either be retained in engine service or offered a comparable position. If he accepts a comparable position he must be guaranteed annual wages and paid necessary relocation allowances; and if he refuses the comparable position he nonetheless receives substantial severance allowances. The employment of firemen with under two years' seniority may be terminated, but only upon payment of substantial severance allowances.

In determining that the carriers should be free to abolish 90% of the firemen's positions, the Board focused its attention principally upon the question of safe operations of the trains. The Congress directed, in section 7 of Public Law 88-108, that the Board give due consideration to this factor, and the Board left no doubt that it complied with this instruction:

> "Of these three considerations [safety, burden on other crew members, and adequacy of service], that of safety of railroad employees and equipment seems to us, in the context of this case, to require the most careful attention.
>
> "This last observation merits a brief additional comment and explanation. It may be fairly stated that concern with safety has pervaded this entire

proceeding. It was apparent in the presentations and arguments by all the organizations and by the carriers, and was further emphasized by the inquiries which members of the Board directed to witnesses and counsel. . . ." (Op. Neutral Members, 41 Lab. Arb., at 688).

The Award also made provision for a binding local arbitration procedure whereby the number of crew members—apart from firemen[2]—to be used in road freight and yard crews was to be fixed on a local basis by Special Boards of Adjustment. The Award carefully and in detail instructed the local Special Boards of Adjustment to analyze the safety factors involved in the fixing of minimum crew levels in their areas.[3]

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[2] The crew members the determination of which was to be left to local arbitration were the crew members apart from the locomotive crew. The national Board had, as we have noted, ruled as to the issue of the maintenance of firemen in the diesel freight locomotives.

[3] The Arbitration Board instructed the Special Boards of Adjustment to use the following guidelines in reaching their decisions:

"C(1). The special board of adjustment in making its decision shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

"C(2). General Considerations.

(a) Assurance of adequate safety.

(b) Avoidance of unreasonable burden or workload on members of the crew.

(c) Changes in operating conditions, including density of traffic.

(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.

(e) Special conditions which exist on any particular assignment.

(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.

(g) Physical characteristics of the line to be traversed and in

Such boards have made local Awards with respect to the operations of each of the appellees, and the awards so made regarding the Missouri Pacific Railroad Company and The Texas & Pacific Railroad Company were received in evidence as typical. The local Award with respect to the Missouri Pacific made it clear that "basically" all the guidelines under which it was rendered "relate to safety of operation or workload." (P. 33a, *infra.*)

Here again, as in the case of firemen, the Award contained liberal job protection provisions. Thus, train service employees, other than those furloughed (and thus not working) on the effective date of the Award, are entitled to continue to work in train service until their employment is terminated by natural attrition, such as death, disability, retirement, or discharge for cause.

The local Awards provide for smaller freight and yard crews than do the Arkansas laws, and thus here again (as in the case of the firemen) there is a flat conflict between the product of the Congressionally-ordained compulsory arbitration and the state laws. For example, the Award respecting Missouri Pacific operations in Arkansas fixes the minimum crew re-

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the areas where switching or industrial work is to be performed (including grade and general climatic conditions).

(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.

(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings of intersections.

(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).

(k) The presence or absence of a fireman in the engine service crew." (See pp. 28a-30a, *infra.*)

quirement of main line local freight trains at two brakemen, and the Arkansas freight crew law requires three. The Award fixes the minimum crew for all classes of road service on branch lines at one brakeman, and the state law requires three. The minimum crew in yard service is fixed by the Award at one helper (except for four yards, one of which is in Arkansas), while the Arkansas switch crew law requires a minimum of three helpers. The Award further provided that no helper shall be required in the Paragould, Arkansas, yard, but the state law requires a minimum of three.

This action was commenced on April 10, 1964, by six interstate railroads operating in Arkansas against certain state prosecuting attorneys, seeking an injunction against their continued enforcement of the Arkansas "crew consist" laws. (Tr. 1) The railroad brotherhoods, appellants in No. 1054, intervened. (Tr. 26)

The district court held that these Arkansas laws "are in substantial conflict with Public Law 88-108", concluding:

> "The attacked statutes constitute an obstacle to the accomplishment of the federal aims and purposes and frustrate the national scheme of regulation, and must be deemed superseded by the federal legislation." (239 F. Supp., at 27-28; Juris. St. No. 1054, at 57)[4]

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[4] Largely because of the holding of this Court in *Missouri Pac. R. Co.* v. *Norwood*, 283 U.S. 249 (1931), that these state laws were not preempted by the Railway Labor Act and the Interstate Commerce Act, as those federal statutes then stood, the dissenting judge deferred to this Court with respect to an application of the preemption doctrine based on the federal statutes as they now exist. However, on the merits of the preemption question he did observe: "I recognize that a strong case can be made for preemption in the situation here presented." (See note 7, pp. 13-14, *infra*.)

The prosecutors and the Brotherhoods appealed to this Court. (Tr. 123, 130) On March 27, 1965, after the District Court had unanimously declined to stay its injunction, (Tr. 122) Mr. Justice White granted a stay of that injunction, conditioned on the appellants' meeting an accelerated schedule for the filing of Jurisdictional Statements, and Reply Briefs to any Motion to Affirm.

ARGUMENT

1. The decision of the District Court is clearly correct on the basis on which it was rendered. The effect of Public Law 88-108, and of the Award rendered under it, on state legislation providing for mandatory jobs and mandatory minimum crew levels on train crews varying from those provided under the Award is so plain as not to require further briefing and oral argument. On this basis, and in the interest of expeditious termination of this controversy, we urge summary affirmance of the judgment of the District Court.[5]

The decisions of this Court leave no room for doubt respecting the preempting effect of federal labor legislation passed pursuant to Congress' paramount power to regulate interstate commerce. In one of the leading cases in the area, this Court has held that a state statute must give way even to the terms of a collective bargaining agreement negotiated pursuant to the provisions of the National Labor Relations Act, the counterpart of the Railway Labor Act in fields other than those of rail and air transportation: "The paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an

[5] We note that in *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963), the Court summarily disposed of an earlier aspect of this general controversy, doubtless in the interest of prompt resolution of the issues involved.

enactment of Congress." *Teamsters Union* v. *Oliver,* 358 U.S. 283, 296-97 (1959). See also, *Teamsters Union* v. *Morton,* 377 U.S. 252 (1964).

Similar results have been held to follow under the Railway Labor Act, which, like the National Labor Relations Act, establishes a national policy of uniform application. Thus, this Court has held state legislation inconsistent with railroad collective bargaining contracts to have been superseded by the Railway Labor Act. In *California* v. *Taylor,* 353 U.S. 553, 567 (1957), the Court said:

> "Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally-protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws."

Accordingly, even if the Awards made pursuant to Public Law 88-108 were regarded as collective bargaining agreements made under the authority of an Act of Congress, their terms would supersede conflicting state laws. However, they are not simply collective bargaining agreements. They are directives made by governmental agencies, acting within guidelines laid down by the Congress, and considering a variety of public interest factors, to which Congress lawfully delegated its authority to fix minimum train crew employment levels on the nation's railroads.[6]

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[6] None of the appellants raise any question respecting the validity of the Award of Arbitration Board No. 282. Its validity was sustained in all respects in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, B. & Q. R. Co.,* 225 F. Supp. 11 (D.D.C. 1964) where it was held that Congress had in this instance made a lawful delegation of its legislative power to the Arbitration Board. The Court of Appeals affirmed, 331 F.2d 1020 (D.C. Cir. 1964), and this Court denied certiorari, 377 U.S. 918 (1964).

The conflict between the Arkansas minimum train crew consist laws and the Arbitration Award entered under Public Law 88-108 is obvious and clear. The Act empowers and directs the Arbitration Board to fix the size of minimum train crews. This was at the heart of the vexed question which the Board was directed to take in hand. The Board has done so. The state laws in question also purport to fix the size of train crews and prescribe minimums which are in excess of and at variance with those fixed by the Board or under the local awards provided for by the Board. The Commerce Clause and the Supremacy Clause ordain that the conflict must be resolved in favor of the Award entered under the federal mandate.

The District Court rightly rejected the fallacious contention that there was really no conflict between the federal and state requirements as to crew manning levels because both spoke in terms of minimums so that the railroads could easily comply with both sets of criteria by simply applying the higher of the two differing minimums.

This argument is as much at variance with the precedents as it is lacking in logic. The whole point of the issue before the Arbitration Board was, what was the minimum level of crew manning at which the railroads were to be authorized to operate trains? It would completely frustrate the effect of the Award for the states to be permitted to declare that the railroads were not authorized to have their trains manned at the levels permitted by the Board. It would take away an area of management discretion and economic freedom which the Board intended the railroads to have.

It has been held by this Court in this area that where federal law authorizes—though it does not require—a

particular collective bargaining agreement, state legislation prohibiting it must give way. Thus, in *Teamsters Union* v. *Oliver, supra,* the mere fact that federal law authorized the parties to enter into the contract in question—although it certainly did not require them to enter into a contract containing those terms—was sufficient to prevent application of a state law which prohibited the arrangement. Likewise, in *Franklin National Bank* v. *New York,* 347 U.S. 373 (1954), it was held that national banks could advertise the existence of their "savings" accounts, despite a state statute which forbade any but certain specified banks from using the word "savings" in advertising. This holding was reached simply on the basis of the authorization in the National Banking and Federal Reserve Acts to national banks to accept savings accounts—although the national banks were perfectly free, as a matter of federal law, not to advertise the availability of savings accounts or not to use the word "savings" in that advertising.

The District Court's exhaustive opinion is such a clear presentation of the historical facts involved and so convincingly dispositive of the question as to the effect of Public Law 88-108 on the state laws, that we respectively submit that this case is an appropriate one for affirmance without further briefs or oral argument.[7]

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[7] Should the Court note probable jurisdiction, we will argue that, even apart from Public Law 88-108, in the light of the recent decisions of this Court on preemption in the labor relations field, the Arkansas crew consist laws would be preempted by the Railway Labor Act and by the National Transportation Policy—which was not enacted when this Court last upheld the Arkansas crew consist laws in *Missouri Pacific R. Co.* v. *Norwood,* 283 U.S. 249 (1931). See *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945) (relying

2. On prior occasions, the Arkansas crew consist laws have been upheld against claims of conflict with the Commerce Clause or with the Railway Labor Act, on the ground that they amounted to permissible local safety regulations. See *Missouri Pacific R. Co.* v. *Norwood,* 283 U.S. 249, 255-56 (1931); *Chicago, Rock Island & Pac. R. Co.* v. *Arkansas,* 219 U.S. 453 (1911); *St. Louis, Iron Mountain & Sou. R. Co.* v. *Arkansas,* 240 U.S. 518, 521 (1916). And, to be sure, in *Teamsters Union* v. *Oliver,* 358 U.S. 283, 297 (1959), this Court indicated that a "local health or safety regulation" might, under some circumstances, be upheld despite a conflict with a collective bargaining contract which federal law empowered labor and management to make.—The Jurisdictional Statements rest primarily upon this so-called "safety regulation" exception to the rule of the *Oliver* case.

This attempted exception from the rule that a state statute must bow to a federally-sanctioned collective bargaining agreement—or arbitration award—patently cannot be sustained in this case. We start with the fact that whatever might be thought to be the

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on National Transportation Policy in holding unconstitutional Arizona train length law). The law on preemption in the labor field was so little developed in 1931 that this Court's entire discussion of the problem in *Norwood* consisted of the following: "No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration." 283 U.S., at 258.

Moreover, should probable jurisdiction be noted, we will also urge as a basis for affirmance of the judgment the point that the Arkansas laws constitute a constitutionally impermissible discrimination against interstate commerce. This is because the exemptions contained in the laws are such as, in fact, to exempt all intrastate railroads and restrict the application of the laws to interstate railroads. *Cf. Best & Co.* v. *Maxwell,* 311 U.S. 454 (1940).

"safety" justification of the crew consist laws, they clearly are totally different from the normal sort of industrial health or safety laws which deal with such subjects as safety equipment, provision of protective clothing, factory ventilation, washroom conditions and so forth.[8] The unvarnished fact of the matter is that the "crew consist" laws are laws guaranteeing a specificied arbitrary number of jobs on each operating train. They may possibly be thought to have some safety aspects but predominantly they are "full employment" legislation,[9] directly regulating what has been for many years the central labor-management problem in the railroad industry: the problem of the number of jobs to be provided on each train. The laws thus seek "specifically to adjust relationships in the world of commerce." (*Teamsters Union* v. *Oliver*,

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[8] Listing the sort of permissible state health and safety laws in *Terminal R.R. Ass'n* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6-7 (1943), this Court specifically mentioned: "sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection."

[9] See Lecht, *Experience Under Railway Legislation* (1955), pp. 93-94: "Trainmen and firemen assumed the lead in pushing full-crew bills because unemployment was particularly severe among their members."

Slichter, *Union Policies and Industrial Management* (1941), p. 187:

"One of the most ambitious efforts to make work by requiring excessive crews, or the employment of unnecessary men, is being made (with great success) by the train service unions on the railroads. These unions have been spurred to require the employment of unneeded men by the great drop in the employment of train service employees. The train service unions have used three principal methods to make work: (1) support of legislation, either requiring full crews or limiting the length of trains; (2) retaining obsolete rules which make work; and (3) enforcing the interpretations of rules so as to make work and to penalize the roads for using economical methods of operation."

supra, at 297.) They frontally attack one aspect of what is a nation-wide problem in labor-management relations: the question of how far the introduction of modern equipment and automatic devices will be allowed to have its natural effect of reducing employment in certain obsolete job categories.[10] To the extent that there are safety aspects to this question, these aspects are completely intertwined with the basic economic questions.

Thus, the short answer to the claim that, as purported safety regulations, these laws can stand despite their conflict with the arbitration award, is found in Section 7 of Public Law 88-108. There, the Arbitration Board was commanded, in making its award, to give "due consideration to the effect of the proposed award upon adequate and safe transportation service." Congress, in providing an arbitrated solution to the economic problems involved in the crew level question on the nation's railroads, ordained that any safety questions involved should be taken into account. And the opinion of the neutral members of the Board which we have

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[10] As the opinion of the neutral members of the Board (41 Lab. Arb., at 688) stated:

> "[T]he size of road and yard crews in other than engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, state full crew laws, or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions."

reviewed in the Statement, makes it plain that they fully considered the safety aspects of the elimination of the superfluous jobs which was provided in their award, and ordered that the local boards give the fullest consideration to safety factors.

Thus, unlike the situation prevailing on previous reviews of this or similar state legislation, Congress here took in hand the entire problem of crew levels on the nation's railroads—the safety aspects as well as the predominant economic aspects of the question.[11] It authorizes and directed its creature, the Arbitration Board, to make an award dispositive of the whole question. Upon this basis, the narrow "safety" justification under which these crew consist laws have been upheld in the past can no longer stand. Once Congress has entrusted the question of safety as affected by crew levels on trains operated by interstate carriers to the Arbitration Board, inconsistent state regulation or crew levels could no more stand as a regulation of safety than it could as a frank, undiluted economic regulation of a matter for which the parties in a collective bargaining contract, or a compulsory arbitration board, had provided a solution.

3. Appellants claim that the legislative history of Public Law 88-108 indicates that the Congress did not intend that state full crew laws be preempted by the arbitration award. Since the preemptive effect of the statute and the Award is plain on the face of their provisions, this contention is irrelevant. However, the fact of the matter is, as the lower court observed, "If any rational conclusion can be drawn from a legislative history on the question . . . it is that the Congress

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[11] "When Congress set up compulsory arbitration to settle the locomotive helper-fireman question, it specified safety as a guideline to be considered in the arbitrators' decision." Advertisement, Brotherhood of Locomotive Firemen and Enginemen, N.Y. Times, May 9, 1965, § IV, p. E-5.

intentionally elected not to include a [illegible]ng provision for such laws and thereby create local exceptions to the authority of the arbitration board to fix the size of train crews on a nationally uniform basis." (239 F. Supp., at 23; Juris. St. No. 1054, at 49)

Thus, while it is true that Representative Harris stated on the floor of the House that he did not believe state laws would be affected by the bill, he was immediately challenged by Congressman Smith, Chairman of the Committee on Rules, which had considered the bill.[12] Moreover, during the hearings on the bill pro-

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[12] "MR. SMITH OF VIRGINIA. Mr. Speaker, the colloquy between the gentleman from California [Mr. Sisk], and the chairman of the Committee on Interstate and Foreign Commerce, the gentleman from Arkansas [Mr. Harris], raises a question that has not previously been discussed on the floor of the House. It was discussed in the committee yesterday before the Committee on Rules. I do not like to remain silent in view of the statement that a State law can overcome the constitutional provision which gives exclusive jurisdiction to the Federal Government in matters of interstate commerce. I do not know what precedents may have been found with reference to this question, but of course, in the matter of purely intrastate commerce under our Constitution the State, of course, would have authority but when it comes to dealing with interstate commerce I think the provisions of the Constitution are such and the decisions of the courts are such that there is no way in which a State can overcome the power of the Federal Government under the interstate commerce clause.

I simply wanted to make my own position clear with r[illegible]erence to that question, for whatever it may be worth.

MR. EDMONDSON. Mr. Speaker, will the gentleman yield?

MR. SMITH OF VIRGINIA. I yield to the gentleman from Oklahoma.

MR. EDMONDSON. I thank the distinguished chairman of the Committee on Rules for yielding to me at this point. Would this not mean in effect that about the only kind of train operation in which State laws would prevail would be in the switching of cars involving switch engine operations?

MR. SMITH OF VIRGINIA. Of course, it is just a question of what is or what constitutes interstate commerce. Now, as you know, the decisions of the courts and the actions of the Congress have gone a long way in putting almost everything under interstate commerce." (109 Cong. Rec. 15273 (1963)).

posed by the President, which would have assigned to the Interstate Commerce Commission essentially the same responsibility that was delegated under the Public Law to the Board, representatives of the Government several times brought to the attention of the House committee that the bill did not contain a provision that would avert preemption of state crew consist laws, and that if the Congress did not intend such preemption a saving clause should be included.[13]

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[13] "THE CHAIRMAN. I asked about that myself, Mr. Secretary. Is there anything in the Interstate Commerce Act which gives recognition to full-crew laws of the various States?

SECRETARY WIRTZ. I would want to answer subject to check, but I think not.

THE CHAIRMAN. It is my impression that there is not, but the courts have upheld full-crew laws in the various States.

SECRETARY WIRTZ. That is correct.

THE CHAIRMAN. That being true, I wish that you, if your counsel is with you, would point out to me anywhere in this resolution in which this would not supersede the full-crew laws or any other matters involved with work rules as contained in these notices.

SECRETARY WIRTZ. I think to the best of our knowledge, there would not be anything specifically that had that result.

THE CHAIRMAN. I agree with Mr. Sibal, then, that research would be necessary, because it would seem to me the logical conclusion is that this gives the Interstate Commerce Commission authority to supersede these laws.

SECRETARY WIRTZ. I would respect your views, sir, completely on it."

(Hearings before House Committee on Interstate and Foreign Commerce, on H. J. Res. 565, 88th Cong., 1st Sess. (1963), pp. 111-113.)

The question was again raised during testimony before the same Committee by Mr. Ginnane, counsel for the Interstate Commerce Commission, who analyzed the effect of the bill as then drawn on the state crew consist laws:

"MR. GINNANE. * * * It could be argued that if the Commission approves, for example, interim rules changing crew consist, that by virtue of paragraph 1 that would cut across State crew laws. I

In sum, it is clear at the least that the legislative history cannot detract from the clear preemptive force of the statute and the Award, even assuming *arguendo* that the legislative history does not affirmatively support the judgment below.

4. The two year period provided by Public Law 88-108 for the life of the Award, as such, expires on January 25, 1966 as to the provisions relating to crew

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understand that the Secretary of Labor has testified here that that was not an intended result.

THE CHAIRMAN. That is true.

MR. GINNANE. If the Congress wants to be doubly certain, for example, that no such legal consequence follows it could be done simply by making clear in section 1, perhaps parenthetically that paragraph 11 is not to apply.

THE CHAIRMAN. I appreciate your very frank response, because I think it has sort of been left up in the air as to what the courts might do. There has been expression as to what is intended and what some might have thought but I think we also have to provide clarity wherever it is necessary in order that the Commission may have guidance in its effort to carry out the responsibility should it so be directed. I believe you have covered the other notations that I have made already and there is no need to go over them again."

(Hearings before House Committee on Interstate and Foreign Commerce, *supra*, p. 614.)

Mr. Ginnane also cautioned in testimony before the Senate Committee on Commerce that if the Congress did not intend to preempt state crew consist laws then an expression of intent to preserve the state laws should be included in the bill.

"MR. GINNANE. * * * I heard the Secretary of Labor testify yesterday that that was not intended, that they did not intend, by drafting a bill which would authorize the Commission to take only interim action, valid for only 2 years, to brush aside the permanent State full-crew laws.

If it were desired to make that absolutely certain, if that is the desire of Congress, it can be done by just a phrase which would exclude paragraph 11 of Section 5 of the Interstate Commerce Act."

(Hearings before Senate Committee on Commerce on H. J. Res. 565, 88th Cong., 1st Sess. (1963), pp. 400-401.)

members, and on March 31, 1966 as to the provisions relating to firemen. Thereafter, the terms fixed by the Award will govern the relationships between the parties until changed in the manner set forth in the Railway Labor Act.

The District Court held that Public Law 88-108, together with the Award rendered under it, preempted the Arkansas laws permanently, thereby rejecting the contention of the appellant that whatever might be the situation during the two year period specified in the Award pursuant to Section 4 of Public Law 88-108, thereafter those laws would again be operative. Although the brotherhoods do not raise this contention here and the appellant prosecutors do not appear to stress it, it is worth while to indicate why the lower court was plainly correct as to this matter.

It is apparent that by entering the field of crew level regulation through the compulsory arbitration procedure, Congress meant for the Award to serve as a point of departure for the future collective bargaining of the parties, under the Railway Labor Act, for the years to come. The Award itself reflects this intent; in fact, some of the most critical provisions of the Award are wholly inconsistent with the notion that there might be preemption only during the two year period.

For example, under the job protection provisions applicable to firemen, the carriers must pay very substantial severance allowances to the employees whom they are free to separate and must pay relocation allowances to others to whom they are free to offer other positions. Plainly, provisions of this kind evidence an intent to provide for long range relief. It would be

an absurdity to hold that Congress intended the railroads, after they had paid millions of dollars in severance pay to employees, to rehire them after the two year period or to employ others in the jobs declared by the Award to be superfluous.

The intent of Congress was, then, as the Award evidenced, that the compulsory arbitration procedure was to give the parties a bench mark for their future collective bargaining. This intent would be totally frustrated if it were to be held that the effect of Public Law 88-108 and the Award was simply to effect a temporary suspension of the state laws relating to mandatory employment on the railroads. Once Congress has acted in this area and sanctioned a solution inconsistent with the state laws, the status quo was completely altered; it would be totally disruptive of peaceful labor relations to hold that upon the expiration of the Award the state laws would resume their effect.

CONCLUSION

For the reasons stated, this Motion to Affirm should be granted.

Respectfully submitted,

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May 10, 1965.

APPENDIX I

The Commerce Clause

United States Constitution, Article I, Section 8, Clause 3:

"The Congress shall have Power—.

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

APPENDIX II

The National Transportation Policy

The National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. preceding § 1:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act [The Interstate Commerce Act], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act [The Interstate Commerce Act], shall be administered and enforced with a view to carrying out the above declaration of policy."

APPENDIX III

The Railway Labor Act

Sections 2 and 5 through 10 of the Railway Labor Act of 1926, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151a, 152, 155-60:

"§ 2. GENERAL PURPOSES.

"The purposes of this Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES.

"*First. Duty of carriers and employees to settle disputes.*

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"*Second. Consideration of disputes by representatives.*

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively,

by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Designation of representatives.

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to

assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"*Fifth. Agreements to join or not to join labor organizations forbidden.*

"No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"*Sixth. Conference of representatives; time; place; private agreements.*

"In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed

to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. Change in pay, rules, or working conditions contrary to agreement or to section six forbidden.

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Notices of manner of settlement of disputes; posting.

"Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the repre-

sentative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. Violations; prosecution and penalties.

"The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be

paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

"*Eleventh. Union security agreements; check-off.*

"Notwithstanding any other provisions of this Act, or of any other statute or law of the United State, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such em-

ployees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 3 of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein

or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

* * * *

"§ 5. FUNCTIONS OF MEDIATION BOARD.

"*First. Disputes within jurisdiction of Mediation Board.*

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify

both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

"*Second. Interpretation of agreement.*

"In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

"*Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents.*

"The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

"(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so dis-

interested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

"If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this Act for an original appointment by the Mediation Board.

"(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

"(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

"(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to

such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

"(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

"(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

"§ 6. Procedure in Changing Rates of Pay, Rules, and Working Conditions

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

"§ 7. ARBITRATION.

"*First. Submission of controversy to arbitration.*

"Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 1-6 of this Act such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

"*Second. Manner of selecting board of arbitration.*

"Such board of arbitration shall be chosen in the following manner:

"(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

"(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

"Third. Board of arbitration; organization; compensation; procedure.

"(a) Notice of selection or failure to select arbitrators.

"When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

"(b) Organization of board; procedure.

"The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

"(c) Duty to reconvene; questions considered.

"Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

"Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the

same district court clerk's office, as the original award and become a part thereof.

"*(d) Competency of arbitrators.*

"No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

"*(e) Compensation and expenses.*

"Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

"*(f) Award disposition of original and copies.*

"The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Com-

merce Commission, under the Interstate Commerce Act, as amended.

"*(g) Compensation of assistants to board of arbitration; expenses; quarters.*

"A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

"Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

"*(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees.*

"All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with

any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Interstate Commerce Act as amended.

"Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

"§ 8. AGREEMENT TO ARBITRATE; FORM AND CONTENTS; SIGNATURES AND ACKNOWLEDGMENT; REVOCATION.

"The agreement to arbitrate—

"(a) Shall be in writing;

"(b) Shall stipulate that the arbitration is had under the provisions of this Act;

"(c) Shall state whether the board of arbitration is to consist of three or of six members;

"(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

"(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

"(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitra-

tion may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

"(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

"(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

"(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

"(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

"(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

"(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

"(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for

a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

"(n) Shall provide that the respective parties to the award will each faithfully execute the same.

"The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however*, That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

"§ 9. AWARD AND JUDGMENT THEREON; EFFECT OF ACT ON INDIVIDUAL EMPLOYEE.

"*First. Filing of award.*

"The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

"*Second. Conclusiveness of award; judgment.*

"An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the

award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

"*Third. Impeachment of award; grounds.*

"Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

"(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

"(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

"(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

"*Fourth. Effect of partial invalidity of award.*

"If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are

separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

"Fifth. Appeal; record.

"At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

"Sixth. Finality of decision of court of appeals.

"The determination of said court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

"Seventh. Judgment where petitioner's contentions are sustained.

"If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

"Eighth. Duty of employee to render service without consent; right to quit.

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual

employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent.

"§ 10. EMERGENCY BOARD.

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportatiton service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

"There is authorzied to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

APPENDIX IV

Excerpts from the Award of the National Arbitration Board No. 282

The Board has incorporated in this Award any matters on which it found the parties were in agreement, has resolved the matters on which the parties were not in agreement, and has given due consideration to those matters on which the parties were in tentative agreement. Further, the Board has given due consideration to the effect of the Award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

After a full consideration of the evidence and arguments and upon the entire record, the Board makes a complete and final disposition of the issues submitted and finds and awards as follows.

* * * * * * * * * *

PART B—REDUCTIONS IN JOBS

B(1). Within 7 days following the effective date of this Award, each carrier covered by this Award shall have the right to give to each local chairman of the organization representing firemen (helpers) in each fireman (helper) seniority district a list of pool and regularly assigned freight engine crews (including pool and regularly assigned crews used in mixed, miscellaneous, and unclassified services) and a list of regularly assigned yard engine crews (including regularly assigned crews used in transfer, belt line, and miscellaneous yard services) then employed by the carrier in each such seniority district. The two lists shall include those engine crews which, in the carrier's judgment, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper).

B(2). Each local chairman, within 30 days of receipt of the carrier's lists, shall have the right, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, to designate the engine crews in which the carrier shall be required to continue to use firemen (helpers); provided, that such designated crews shall not be more than 10 per cent of the freight engine crews, nor more than 10 per cent of the yard engine crews, in any seniority district, as such crews are listed by the carrier. Each local chairman's designation of crews to be operated with firemen (helpers), made as provided herein, shall be final and binding upon the parties in interest and shall not be subject to challenge or review; but prior conference shall be had between the parties in interest with respect to the crews to be so designated by the local chairman. The time and place for the beginning of such conferences shall be agreed upon within 10 days after the receipt of the carrier's lists by the local chairman, and said time shall be within 20 days after the receipt of the said lists.

B(3). At 3-month intervals following the date of the carrier's original lists, the carrier shall give to each local chairman lists of pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months and which meet the criteria set forth in paragraph B(1) of this Award; and the number of crews designated by the local chairman in which the carrier shall be required to use firemen (helpers) shall thereafter be adjusted, in the manner provided in paragraph B(2) of this Award; provided that not more than 10 per cent of the pool and regularly assigned freight engine crews nor more than 10 per cent of the regularly assigned yard engine crews; then employed by the carrier in any seniority district and included in either list, shall be designated as crews in which firemen (helpers) must be used.

B(4). Copies of all lists herein required to be furnished by the carrier to the local chairman shall be furnished to the general chairman of the organization involved.

B(5). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraph B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition.

* * * * * * * * * * *

III. CONSIST OF ROAD AND YARD CREWS (OTHER THAN ENGINE SERVICE)

Part A—Basic Provisions

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiation. Pending the consummation of local agreements disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and unclassified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, in-

terpretation, or practice, which require a stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

(a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and

(b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives or the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

PART B—REVIEW PROCEDURES

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

* * * * * * * * * * *

B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

PART C—GUIDELINES

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

(a) Assurance of adequate safety.

(b) Avoidance of unreasonable burden or workload on members of the crew.

(c) Changes in operating conditions, including density of traffic.

(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.

(e) Special conditions which exist on any particular assignment.

(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.

(g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).

(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.

(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.

(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).

(k) The presence or absence of a fireman in the engine service crew.

C(3). Particular considerations—passenger road service.

(a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.

(b) The number of passenger cars handled in the train and passenger count.

(c) The method of handling passenger transportation (tickets).

(d) The number of passengers boarding and leaving the train at intermediate stations.

(e) Duties required other than the above on any particular assignment.

C(4). Particular considerations—freight service, including miscellaneous and unclassified services.

(a) The amount and nature of work to be performed en route.

(b) The length of train, in context with the amount and nature of work to be performed en route.

(c) Time limitations applicable to the particular assignment.

C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

(a) The amount and nature of the work to be performed.

(b) Volume of work considered in context with applicable service time limitations.

• • • • • • • • • • •

IV. DURATION

This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.

APPENDIX V

Excerpts from the Awards of the Local Boards of Adjustment With Respect to Missouri Pacific Railroad Company and The Texas & Pacific Railroad Company

Missouri Pacific Railroad Company

(Northern, Central and Southern Districts)

BACKGROUND:

The award of Arbitration Board No. 282 provided that changes in the scope or application of rules, which require a stipulated number of trainmen in road service or brakemen in yard service, could only be accomplished by agreement or in accordance with procedures provided therein.

This Carrier gave notice thereunder on January 25, 1964 to the Organization of proposed changes in the number of brakemen or helpers to be used in several classes of road and yard service.

The Organization refused to meet or negotiate thereon because it considered such notice to be premature. Pursuant to the provisions of such award, this Board was established with the Organization Member and the Neutral Member having been appointed by the National Mediation Board.

When this Board convened on March 31, 1964 the Organization requested an indefinite recess and delay in its proceedings. That request was denied by a decision dated April 1, 1964. The neutral member then urged the parties to engage in the good faith bargaining, upon this crew consist issue, contemplated by the award of Board No. 282. The representatives of the Organization declined to do so and refused to participate further in the proceedings of this Board. Accordingly the following findings and award are based upon the evidence submitted by the Carrier.

FINDINGS:

1. Road Service

The award of Board No. 282 permits notice of proposals for change in the stipulated number of trainmen required to be used in any class of road service in the following categories:

(a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and

(b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen.

The Carrier's notice of January 25, 1964 proposed the following changes in the number of brakemen to be used in road service:

> "All main line local freight trains now requiring three brakemen under the provisions of Article 38 of the Basic Schedule will be operated with two brakemen.
>
> All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with one brakeman, except service on the Great Bend Branch shall not require the use of a brakeman.
>
> All traveling switch engine service will be protected by one brakeman.
>
> The following scheduled passenger trains and all extra passenger trains will not require the use of a brakeman-flagman:
>
> Nos. 14 and 15,
> Nos. 11 and 12 between Kansas City and Pueblo,
> Nos. 1 and 2,
> Nos. 34 and 35,
> Nos. 31 and 32,
> Nos. 37 and 38, and
> Nos. 16 and 17 between Kansas City and Omaha."

Part III C(1) of the award is as follows:

> "C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions."

Paragraph C(2) sets forth the general considerations, C(3) the particular considerations in passenger road service, C(4) the particular considerations in freight service, and C(5) the particular considerations in yard service. It

does not appear necessary to restate them here. Basically they all relate to safety of operation or workload.

(a) Main Line Local Freight Service.

Article 38 of the Trainmen's Schedule provides that "on all main line local freight, 'Dutch' local, and mixed trains, the crew shall consist of a conductor and three brakemen."

It appears that when this rule was first written in 1890 there was a large amount of LCL freight handled in way freight or peddler cars, and that it was the duty of the train crew to load and unload such freight at various stations along the line. Today no way freight or peddler cars are used and the work of loading and unloading them has been eliminated.

At that time, it also appears, many small industries used rail service, whereas now many of them use truck service, which has substantially reduced the switching required by local freight crews.

Other changes over the years are the installation of automatic block signals, CTC, automatic crossing signals and radio communication with and between trains. Operating officials of this Carrier consider flag protection of trains outmoded, in view of the improved systems of control and communication, and propose to change the operating rules to eliminate any requirement for flagging. When that work is eliminated, one less brakeman is necessary to accomplish the work and man all positions for work when the train is stopped.

Through freight trains operate over most of the territory served by these locals. They have a crew consisting of a conductor and two brakemen and perform some switching, set-out and pick-up of cars. This is cogent evidence that the locals can be operated safely with the crew consist proposed by the Carrier.

The presence or absence of a fireman in the engine service crew would not alter these findings, because it appears that on trains manned with a conductor and two brakemen, one of the brakemen rides in the locomotive when running over the road.

Under the circumstances shown, the proposal of the Carrier, with respect to main line local freight service crew requirements, is justified by the guidelines set forth in the award of Board No. 282.

(b) Branch Line Service.

Article 38, referred to in part 1(a) above, also provides that "on branch runs, where the service is light, the crews shall consist of a conductor and two brakemen, excepting that on branches where the trains are heavy enough to require it, three brakemen shall be employed at the discretion of the Superintendent."

This is a long standing recognition that train crews on branch line service can appropriately consist of one less brakeman than on main line service. It appears that generally there is no other service on the branch line, switching is light and uncomplicated, and the number of cars handled is less than on main lines. Changing the stipulation regarding crew consist would not alter the discretion of the Superintendent to assign more brakemen where the trains are heavy enough to require it.

All of the changes in work load and most of those concerning changes in control and communication equipment discussed in part 1(a) hereof are applicable here. There is obviously no necessity for flag protection when the train is the only one on the branch and, if the fireman is eliminated from the engine crew, safe operation can be assured by assigning the brakeman to ride in the locomotive while running over the road.

Under these circumstances the Carrier's proposal, to reduce the crew consist to one brakeman and a conductor, is justified by the guidelines in the award of Board No. 282.

. . . . . .

It appears that since 1910 when that consist rule was adopted there have been many changes in equipment affecting the work of yardmen. Cars are now equipped with hand power brakes, which make the setting of brakes much easier and quicker than the old stem-winding hand brake, and which necessitate setting brakes on fewer cars because the holding power is much greater.

In recent years automated electronic classification yards have been constructed in Kansas City and Little Rock. Utilization of these yards has reduced the necessity for classification work in other yards as trains now arrive with cars grouped for the various connections and industrial areas. Thus lead switching has been greatly reduced and yard work has become mostly pulls and shoves.

Engines are equipped with two-way radio, portable radio sets are available for ground crews to communicate with the engineer, and larger yards have been equipped with tele-talk equipment. Street and highway crossings within switching limits are generally protected by automatic signals.

It appears that these cumulative changes have reduced the efforts required of yardmen and enhanced the safety of yard operations. Even if we assume that firemen will be eliminated from yard engines, it is apparent that the proposal of the Carrier, to reduce the stipulated number of helpers used in all classes of yard service to one, is justified by the guidelines set forth in the award of Board No. 282.

The propriety of the remainder of the Carrier's proposal to operate specific yard assignments without a helper is not so obvious from the evidence adduced and must be

denied under those guidelines, except in the following situations.

It appears that at Leavenworth, Kansas, one yard engine is assigned five days per week to handle setouts and pick-ups by two trains and interchange with two other carriers. The work is so meager that only two or three cars are handled at a time and the time of the crew is largely waiting rather than working time. It could, apparently, be handled easily by a foreman without a helper during his regular tour of duty.

It appears that one yard assignment is maintained at Falls City, Nebraska. It is not operated every day and, when operated, the switching required consumes no more than two hours. It is apparent that the work involved could easily be accomplished by a foreman without a helper during his regular tour of duty.

It appears that one yard assignment is maintained at Fort Scott, Kansas. It is operated only on those days when service is needed and rarely exceeds one hour of work on the days it is used. It is apparent that the work involved could easily be accomplished by a foreman without a helper during his regular tour of duty.

It appears that one yard assignment is maintained at Paragould, Arkansas. It is operated only three days per week and on those days rarely exceeds two hours of work. It is apparent that the work involved could easily be accomplished by a foreman without a helper during his regular tour of duty.

3. General Findings

It should be noted that, under Part III D of the Award of Board No. 282, no employee who was in train or yard service on January 25, 1964 will be separated from the service, unless and until retired, discharged for cause, or otherwise removed from the service of the Carrier by

natural attrition. In their opinion, the neutral members of that board said:

> "The issues in this case involve an obvious distinction between questions concerning *jobs* and questions concerning *men*. Another distinction, however, is equally important: that between the question whether a job is unnecessary and the question whether and in what manner an unnecessary job should be eliminated. Neither the issues nor the Board's award can be understood unless these distinctions are kept in mind. In dealing with both the fireman and the crew consist issues we have established a procedure for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination. The sharpest and most stubborn disagreements have been over this procedure—over any question, indeed, that affected the number of jobs which might be declared 'blankable' within a given length of time. It is important to realize, however that *declaring a job 'blankable' under the terms of the Board's award does not necessarily result in the immediate elimination of that job or the layoff of its occupant.* The Board's award makes the actual elimination of jobs subject, in most cases, to attrition—to the vacating of jobs by the natural processes of retirement, transfer, voluntary quit, discharge, or death. The determination that a job is 'blankable' will usually mean, not that an employee will be laid off, but only that, when it becomes vacant, no new employee need be hired to fill it."

It should also be noted that the proposed changes in the stipulated number of brakemen or helpers required in each class of service are, like the prior rules and practices, stipulations of minimum crew consist. If on particular days or assignments more are needed to accomplish the work efficiently, the Carrier is free to assign a larger crew.

AWARD:

1. (a). All main line local freight trains will be operated with a minimum of two brakemen.

   (b). All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.

   (c). The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.

   (d). The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.

2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service, except that no helper shall be required on the following yard assignments:

   Leavenworth Yard
   Falls City Yard
   Fort Scott Yard
   Paragould Yard.

Missouri Pacific Railroad Company

(Gulf District)

* * * *

AWARD:

1. (a). All main line local freight trains will be operated with a minimum of two brakemen.

   (b). All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.

   (c). The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.

   (d). The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.

2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service.

The Texas & Pacific Railroad Company

* * * *

AWARD:

1. (a). All main line local freight trains and dodgers will be operated with a minimum of two brakemen.

   (b). All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.

   (c). The Carrier's proposal respecting dodger service is denied, except as such service is encompassed by parts (a) and (b) above.

2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service.